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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DESTINY PEDERSEN,

Plaintiff and Appellant,

v.

TARGET STORES,

Defendant and Respondent.

B231964

(Los Angeles County
Super. Ct. No. BC405642)

APPEAL from a judgment of the Superior Court of Los Angeles County.

David L. Minning, Judge. Affirmed.

Horvitz & Levy, Karen M. Bray, Wesley T. Shih, Mark A. Kressel for Plaintiff
and Appellant.

Trachtman & Trachtman, Benjamin R. Trachtman, Ryan M. Craig for Defendant
and Respondent.

Destiny Pedersen allegedly fell on toys strewn on the floor of a Target store. After hearing the evidence, a jury rendered a verdict for Target. On appeal, Pedersen contends that her case was prejudiced by the hearsay statement of an unidentified eyewitness, who said that her misbehaving child caused plaintiff's fall. We conclude (1) plaintiff invited the error by presenting the eyewitness statement during her case-in-chief, and later failed to object to the admission of the statement, and (2) even if the issue was preserved for appeal and assuming that the eyewitness statement was inadmissible hearsay, there was no miscarriage of justice sufficient to justify a reversal of the judgment.

FACTS

Testimony of Pedersen and Her Daughter

On October 27, 2007, Destiny Pedersen entered a Target store with her 12-year-old daughter Monique to purchase an iPod dock with a \$50 Target gift card. Plaintiff went directly to the electronics department for the iPod dock, as Monique lingered in the girls' clothing department. While lingering, Monique "happened to notice that there was [sic] toys on the floor"—pet shop animal toys in boxes—in checkout lane number 27. Monique told the jury that there were two or three items on the floor, contradicting her deposition testimony when she recalled "three to five" toys. After reviewing her deposition during trial, Monique said that there were three to five items on the floor.

Monique joined plaintiff in the electronics department, and they selected an iPod dock. They proceeded to checkout lane number 27, where Monique had previously seen the fallen toys. Monique testified on direct examination, "I didn't notice that they were still there" On cross-examination, Monique stated, "I noticed them but I didn't really pay attention to them." She and plaintiff walked past the three to five toys without a problem. Plaintiff did not see the boxes, and Monique did not point them out.¹

The iPod dock had an advertised price of \$49.99, which would be covered by Monique's \$50 gift card. When the cashier scanned the item, the register showed a price

¹ The record on appeal does not contain a photo or exemplar of the toys.

of \$79.99. Plaintiff turned to walk back to the electronics department for a price check. Monique saw plaintiff take two or three steps, then fall down when her foot came into contact with one of the toys on the ground. Plaintiff said, “‘I’m all right,’ and she stood right back up.” Monique did not help plaintiff stand up.

Monique’s trial testimony dramatically contradicted her deposition testimony. In deposition (taken months before she viewed a Target surveillance recording), Monique testified that plaintiff lay on the floor in pain for four or five minutes, with Monique at her side, while the cashier and other customers stared at them and did nothing to help. Finally, plaintiff supposedly said, “‘Please, can you help me up Monique’ . . . so I kind of grabbed her on like—it’s like below the shoulder,” then helped plaintiff stand up and walk over to the cashier. After viewing a surveillance tape of the incident, Monique realized that she did not help her mother rise from the floor or walk to the cashier; instead, plaintiff got up immediately—in 10 seconds without any assistance—and proceeded on her own to the electronics department.²

Plaintiff recalled that there was a child blocking her way as she left the cashier’s area, among the four or five people in line behind her. As she maneuvered around the child, “my foot came in contact with something that made my foot twist and I fell to the ground.” She then saw some toys on the ground. Plaintiff did not see the toys before she fell, but was not looking at the floor as she walked.

Plaintiff was deposed before seeing the Target surveillance recording, and her deposition testimony was at odds with her trial testimony. In deposition, plaintiff testified that she lay on the floor for four or five minutes after falling. Upon viewing the surveillance recording, plaintiff conceded that she was on the floor for less than 10 seconds, not four or five minutes. Like Monique, plaintiff claimed during deposition that the cashier just stared at them for five minutes without rendering aid, and that Monique helped her to stand up and walk to the food court. Plaintiff conceded that “after looking

² After seeing the surveillance recording, Monique agreed that her deposition testimony “obviously was mistaken.”

at the video, it is clearly a mistake. I was able to get up on my own.” Plaintiff testified during deposition that she hung onto the box containing the iPod dock when she fell, saying, “I couldn’t believe that I still had the box in my hands.” After seeing the video, plaintiff conceded that the box slid from her hands as she fell. In deposition, plaintiff insisted that she limped over to the cashier after falling; she now concedes that the videotape shows she did not go to the cashier, but arose and walked to the electronics department using a normal gait.

When plaintiff returned from the electronics department, Monique observed that plaintiff’s hand was bleeding. The cashier paged the manager, who suggested that plaintiff go and sit in the food court, where a store employee bandaged plaintiff’s hand. At trial, Monique stated that the manager asked plaintiff what happened, and plaintiff said that she fell on some items in the checkout lane. Monique went over and scooped up four or five toys, “two that was [*sic*] on the rack and the rest were on the floor.” By contrast, Monique testified during her deposition that the manager did not ask plaintiff how she fell.

Testimony of Target Employees

Susanna Martirosyan was the cashier on duty in checkout lane number 27. Her primary duties are to help customers purchase merchandise and to “look around . . . for safety, if there is anything on the floor, any liquid, take care of that.” Martirosyan observed that Target has “guest service team leaders who are going around all the time checking” to see if there are items on the floor.

Martirosyan paged the electronics department when plaintiff objected to the scanned price for the iPod dock. Plaintiff was “in a hurry and very upset because we got a different price for that item.” Martirosyan handed the item back to plaintiff and continued to help other guests. She did not see plaintiff fall down.

The customer behind plaintiff was “very angry with her boy; and she was disciplining him that he can’t stay still, and when I heard she was yelling at her boy, I saw she was picking up her son off the floor.” The customer said Pedersen “tripped over [the] child.” After the customer said that plaintiff tripped over the child, Martirosyan

came out from behind the cash register to see what happened, and checked to see if there was anything on the floor. On inspection, Martirosyan saw no toys or other items and no liquids. She testified that there was “nothing on the floor,” adding “There wasn’t anything. I remember for sure because I checked.”

Martirosyan saw plaintiff standing up. She did not appear to be injured. After observing that plaintiff “was okay,” Martirosyan returned to her post and continued her work. Five minutes later, plaintiff returned to cash register. When Martirosyan saw that plaintiff’s finger was bleeding, she signaled for help. Martirosyan completed a team member witness statement. It reads, “1. I was ringing. 2. Check lane 27. 3. Helping guests. 4. When guest fall [*sic*], she tripped over a child because the mother told me there was no liquid on the floor, my son was in her way and she fall [*sic*] down. . . .” (Paragraph identations omitted.)

Target guest service team leader Lily Martinez testified that she came to checkout lane 27 when summoned by the cashier. Though Martinez recalled that plaintiff said “she had tripped over toys and fell on top of the merchandise she was carrying,” Martinez testified that “There was nothing on the floor.” Martinez explained, “[A]t the moment she was telling me that she had tripped over toys, I immediately turned and looked at the floor. The toys would have been there. And there was nothing on the floor.” This conversation took place in the cashier’s area, so Martinez could look straight at the floor.

Martinez walked through the checkout lanes in a maneuver called “speedweaving” or “walking the racetrack” five to 10 minutes before the incident. It is her job to pick up fallen items immediately while performing this maneuver. There were no objects in the checkout lanes during the speedweaving maneuver before plaintiff fell.

Target manager Rejina Roque-Coti filled out a guest incident report, which she and plaintiff both signed. The report reads, “[The cashier] called for price check and I was told to go [*sic*] dept. I turned with item in my hand and there was a child in the way and I scuffled and the next thing I know I fall. There were checklane items on the floor. My right [*sic*] gouged and bleeding and left ankle twisted.” Roque-Coti looked at checkout lane 27 and did not see any items on the floor. With respect to Monique’s claim

of collecting fallen items and putting them on the table in the food court in front of Roque-Coti, the manager said, “Absolutely not.”

Roque-Coti wrote a second report concerning her own response to the incident. She wrote, “When I arrived at Food Ave. [Pedersen] was sitting down. I immediately asked if she was alright and she said her right hand and ankle hurt. I asked if she need [sic] emergency care, she said, ‘no I’ll be o.k.’ I asked her about the incident and she said she tripped over a child and items that the child had thrown on the floor. I asked . . . Lily [Martinez] if there was liquid or debris on the floor and she responded no. . . .” Roque-Coti used the word “tripped” because that is how she interpreted plaintiff’s use of the word “scuffled.”

PROCEDURAL HISTORY

Pedersen sued Target for negligence in 2009.³ After deliberating for two hours, a jury found for Target, by a vote of nine to three. Judgment was entered on January 18, 2011. Pedersen filed a timely notice of appeal.

DISCUSSION

Pedersen moved in limine for an order precluding Target from alluding to statements made by an unidentified percipient witness. The witness, a store customer who was waiting in line, said her child was “in the way,” causing Pedersen to “fall down” (the Customer Statement). The Customer Statement was made to Target employee Martirosyan, who included it in a report about the incident. Pedersen argued that the Customer Statement is hearsay and must be excluded. In opposition, Target asserted that the Customer Statement is a spontaneous declaration made under the stress of the event. The court denied Pedersen’s motion in limine, and ruled that the Customer Statement is admissible.

Plaintiff presented the Customer Statement to the jury. She called Martirosyan as her first witness and asked questions about the Customer Statement.⁴ At the close of

³ Pedersen sued additional defendants for medical malpractice. The health care defendants are not before us in this appeal.

evidence, the court asked, with respect to admitting Martirosyan’s report containing the Customer Statement, “Any objections?” Plaintiff’s counsel replied “no.”

A verdict cannot be set aside, nor a judgment reversed, unless a timely objection was made clearly stating the grounds for excluding evidence. (Evid. Code, § 353, subd. (a).) “Generally when an *in limine* ruling that evidence is admissible has been made, the party seeking exclusion must object at such time as the evidence is actually offered to preserve the issue for appeal. [Citations.] The reason for this rule is that until the evidence is actually offered, and the court is aware of its relevance in context, its probative value, and its potential for prejudice, matters related to the state of the evidence at the time an objection is made, the court cannot intelligently rule on admissibility.” (*People v. Jennings* (1988) 46 Cal.3d 963, 975, fn. 3. Emphasis added. Accord: *People v. Crittenden* (1994) 9 Cal.4th 83, 126.) “[A]n objection at the time the evidence is offered serves to focus the issue and to protect the record.” (*People v. Morris* (1991) 53 Cal.3d 152, 190; *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 671. In short, a motion in limine to exclude evidence is not a sufficient objection unless it was directed to a particular, identifiable body of evidence and was made at a time when the trial court could determine the evidentiary question in its appropriate context.

Pedersen chose to present the supposedly objectionable evidence herself, and asked Martirosyan whether she recalled the Customer Statement. By eliciting the very testimony she now challenges, Pedersen invited the error claimed on appeal. “It is axiomatic that a party who himself offers inadmissible evidence is estopped to assert error in regard thereto.” (*People v. Williams* (1988) 44 Cal.3d 883, 912.) “[A]n *in limine* ruling on admissibility is not binding if the evidence is later introduced.” (*Ibid.*) The objection must be renewed because “the trial court could not make an informed decision at a time when it had heard none of the evidence.” (*Id.* at p. 913.)

⁴ On direct examination, plaintiff’s counsel asked “And a second witness saying—you said, ‘When guest fall, she tripped over a child.’ Is that correct?” Martirosyan replied, “Yes. That’s what she said.” (Faulty grammar in original.)

To preserve the issue for appeal, plaintiff had to question Martirosyan about the demeanor of the customer, then renew her objection that Martirosyan did not describe a person who was under the stress of nervous excitement from an event, so that, in context, the Customer Statement should be excluded.⁵ (Evid. Code, § 1240.) To compound her error, plaintiff had no objection to admitting the Customer Statement into evidence at the end of the evidentiary phase, thereby waiving the issue on appeal.

Assuming that Pedersen’s objection was properly preserved for appeal, and assuming further that the Customer Statement is hearsay, Pedersen cannot show that admitting the evidence resulted in a miscarriage of justice. “No judgment shall be set aside, or new trial granted, in any cause, on the ground . . . of the improper admission or rejection of evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.” (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b).)

Three Target employees testified that they looked at the floor where plaintiff fell and saw nothing. Martirosyan came out from behind the cash register and looked at the floor as plaintiff stood, before she left for the electronics department for a price check. Plaintiff and Monique testified—and the surveillance video showed—that plaintiff stood up and walked away within 10 seconds. In that brief period, Martirosyan saw “nothing on the floor,” adding “I remember for sure because I checked.” After plaintiff returned from the electronics department a few minutes later, Martirosyan signaled for managerial help to address plaintiff’s bloody finger. While standing near the cashier’s post, plaintiff said she tripped over toys, but Martinez “immediately turned . . . and there was nothing on the floor.” Finally, manager Roque-Coti looked at checkout lane 27 and did not see items on the floor; she denied that Monique collected toys from the floor and brought

⁵ Martirosyan described the customer as “very angry” and “yelling” while picking up her misbehaving child from the floor in checkout lane 27 and blaming him for Pedersen’s fall. Even if Martirosyan asked the angry customer what happened, it would not make the customer’s answer nonspontaneous. (*People v. Poggi* (1988) 45 Cal.3d 306, 306, 319-320; *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1590.)

them to the food court. The Customer Statement merely corroborates the testimony of three witnesses that something other than fallen items caused plaintiff's fall.

Plaintiff suggests that the jury would *by necessity* have ruled in her favor because the testimony of plaintiff and Monique is unrefuted, once the Customer Statement is omitted. We disagree. The jury had to actually believe the testimony of plaintiff and her daughter to find in plaintiff's favor, and their testimony is not believable. Plaintiff and Monique fabricated a story about plaintiff lying on the floor in pain for four or five minutes, with Monique by plaintiff's side, and no one helped them. As the story went, plaintiff asked Monique to help her stand up and support her as she limped to the cashier. The surveillance camera showed that the deposition testimony of both plaintiff and Monique was false. Plaintiff was on the floor for less than 10 seconds, Monique was not next to her, plaintiff rose immediately without assistance and promptly walked with a normal gait to the electronics department, not to the cashier. In deposition, Monique quoted plaintiff as saying, "Please, can you help me up Monique"; at trial, Monique quoted plaintiff as saying (at the same moment), "I'm all right." Given the tandem effort to fabricate a story that a surveillance camera proved false, it is unlikely that a reasonable jury would believe any other portion of Monique's or plaintiff's testimony regarding the alleged three to five toys on the floor.

In sum, plaintiff has not demonstrated a reasonable probability that she would have obtained a more favorable result had the evidence been excluded. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800; *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 887.) Absent a showing of prejudicial error, we cannot set aside the judgment.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.